UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In Re: Bard IVC Filters Products Liability Litigation	)	MD-15-02641-PHX-DGC
	)	Phoenix, Arizona
	)	**December 9, 2016**

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEVENTH SCHEDULING CONFERENCE

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10:01:31

P R O C E E D I N G S

THE COURTROOM DEPUTY: MDL 2015-2641, Bard IVC Filters Product Litigation Liability, on for the seventh

15:00:37 scheduling conference.

Will the parties please announce.

MR. BOATMAN: Good afternoon, Your Honor. Bob Boatman, Ramon Lopez, Paul Stoller, and Wendy Fleishman for the plaintiffs.

15:00:48 THE COURT: Good afternoon.

MR. NORTH: Good afternoon, Your Honor. Richard North, Brandee Kowalzyk, and Jim Condo on behalf of the defendants.

THE COURT: All right. Good afternoon.

15:01:00 For folks who are on the phone, we have you muted so we can't hear you because, as you may understand, somebody on the phone has their hold music on. Maybe it's stopped by now. We hope so for the benefit of everybody else on the phone. But it's 3 o'clock so we're going to move ahead.

15:01:18 Counsel, let's just run through the joint report that you've provided and then I have a few additional matters that I want to bring up at the end.

As far as the ESI discovery status is concerned, is

15:01:37 there any additional information that you want to share that wasn't included in that report?

15:01:40 MR. STOLLER: Your Honor, this is Paul Stoller. In terms of reporting, I don't think there's anything else to say. We have some issues, as indicated, with respect to custodians and that not all the custodians we understood were
15:01:53 going to be collected and produced have been collected and produced. I have received an e-mail from Mr. North last night giving me some explanation of those. I think there were nine custodians on our list, and I can't remember out of the total number but it's somewhere around between 60 and 80
15:02:11 I believe. But at any rate, I think there were nine.

The explanation I got last night was three of those they do not have documents for because they were not retained. I think we'll have some further conversations with defendants about that and about whether we need to bring that issue of
15:02:26 spoliation to the Court. I just don't know yet until we get more information about what happened, what litigation holds were in place at the time and those sort of things.

Other 6 were -- and I sent Mr. North an e-mail to that effect this afternoon -- custodians that we understood
15:02:43 and in fact that they have confirmed in e-mails that they were going to -- custodians who had had collections prior to litigation that they had agreed they would collect -- refresh and collect and produce. And to our understanding that hasn't happened. I assume they will do so because they said
15:03:03 previously they would. That will result in, presumably, some

15:03:06 additional productions, maybe later this year or early the next. I don't know the timing of that. But I would characterize those issues as fairly nascent because those just came up.

15:03:17 THE COURT: Mr. North.

MR. NORTH: Those issues are very minor in --

THE COURT: Pull the mic over, would you.

MR. NORTH: Those issues are very minor, in our view. We have provided an explanation to Mr. Stoller. I

15:03:26 don't think I was clear enough on a couple of points. I think there are only three people where we don't have any data. But we're going to meet and confer this week, and I think once we discuss that further we will either be able to eliminate any further issue or make it very narrow.

15:03:42 THE COURT: Well, are there -- are there custodians for whom you have data that you promised to search that you have not searched?

MR. NORTH: There are two custodians that we do have data that our notes internally indicated that Mr. Stoller had

15:03:58 withdrawn those when we were negotiating which custodians would be searched and which ones would not. There apparently was a miscommunication on our part. We have agreed to go and search those now that he said he has in fact not withdrawn those two.

15:04:15 THE COURT: So there are two of them?

15:04:16 MR. NORTH: Yes.

THE COURT: When do you anticipate that happening?

MR. NORTH: Oh, I think it can happen this week, Your Honor. They're not central players, so I don't think 15:04:25 they're going to be very voluminous in the amount of material produced.

THE COURT: And when you say "this week," are you anticipating you can search and produce this week?

MR. NORTH: Unless I'm mistaken in the volume, I 15:04:37 think that's correct, Your Honor. I have not seen a report on the volume. Mr. Stoller just clarified for me earlier today that he indeed wanted those two searched and that our records were wrong that he had withdrawn those. So I don't have the count on the volume yet. I can't fathom they have a 15:04:56 lot, knowing what their positions were. We will try our best. If we can't do it next week, we'll report to the Court or report to Mr. Stoller.

THE COURT: And so there's two you say you haven't searched because of the miscommunication and three you agreed 15:05:13 to search but as to whom you have no data; is that right?

MR. NORTH: Yes, Your Honor. Two of those were sales representatives who left the company in September of 2008. At that particular time we only had about ten -- had had maybe ten cases over the years and there was not a mass 15:05:34 litigation and the company's legal hold practice at that

15:05:36 point was to send out an individual legal hold notice for each newly filed case, and it would always designate the sales representative at issue in that case. It was only later when the litigation began expanding that the legal hold 15:05:53 notice was sent to the entire sales force. So that's the issue with two of them.

The third one, we can't figure out what's going on. I've asked my vendor to further investigate this. That person was subject to the legal hold. They left the company in 2011. 15:06:09 At the time right before they left the company, we had our ESI vendor do a complete sweep of everybody associated or on the legal hold. This would have been late 2010 bleeding over into 2011. But our vendor is now telling us they don't have any data for this person. And so we've asked them to please go 15:06:30 back and investigate why, because their instructions were to include that person and they should have data on that person. So I hope to find out an answer to that question early next week.

THE COURT: And are those five, as far as you're 15:06:46 concerned, the only ones at issue?

MR. NORTH: There are three others that we have produced materials for that we collected in 2005 or early 2006 when we did not do -- when we did the first major collection. They left between 2006 and 2008. And it appears 15:07:10 that while everything that was collected in 2005 has been

searched and produced, that data may not have -- additional data may not have been retained, or all of the data may not have been retained in 2008 or '7 when they left. So there's a potential gap of two to three years for those three people.

THE COURT: All right. Thanks.

Mr. Stoller.

MR. STOLLER: Just a few corrections, Your Honor.

My list is four people -- John McDonald, Brian Barry, Joe DeJohn, and Mark Kumming -- that fall into that last category. Again, all witnesses we identified as refresh custodians and they agreed, I believe, in August, if not earlier, to search, to go back and search and produce those.

The two that I understand they have identified that they haven't collected were -- I don't understand them to be sales associates, they were the regional sales managers who we were in here some time ago contesting about whether or not we should get access to those and you ordered their production.

And the third thing I think I would correct, Your Honor, is that the two that they indicated they understood we withdrew were actually -- they weren't on our list, they were on their beginning list. So I'm not sure where the miscommunication came in, but my understanding is they're now going to go back and get them and produce them, presumably.

MR. NORTH: Just a couple of additional points, Your Honor. He's correct those two were on one of our lists, but

15:08:49 our notes reflect they were withdrawn. It's obviously just miscommunication, and we will work that out.

The other thing is there really are only three and not four, as Mr. Stoller's suggesting. John McDermott is one 15:09:03 he puts in that category. Mr. McDermott left the company in October of 2007 and at the time of his departure his ESI was collected at the moment of departure. And all of his ESI had previously been processed and produced in the productions of 2010 and 2012, so there were very few additional documents 15:09:24 that came up. But all of his materials have been collected and processed.

THE COURT: All right.

MR. STOLLER: Just one -- Richard, that's not consistent with the e-mail I have directly in front of me.

15:09:36 THE COURT: Mr. Stoller, let's not have you talk to him directly during the hearing.

MR. STOLLER: I apologize.

THE COURT: Mr. North, I'm going to provide in the order after this that additional production from searches of 15:09:49 these individuals will be made by the 22nd --

MR. NORTH: Okay.

THE COURT: -- at the latest. Earlier if possible.

And if you have discussions or concerns about lost ESI and you're thinking about bringing it to my attention, 15:10:10 please keep in mind that we have a new rule of procedure that

15:10:14 deals with that specifically, Rule 37(e). That is what I will apply if there's an issue raised about lost ESI.

Okay. Anything else we need to discuss on the ESI front?

15:10:28 MR. STOLLER: No, Your Honor.

THE COURT: Anything from you, Mr. North?

MR. NORTH: Nothing, Your Honor.

THE COURT: Okay.

With respect to the bellwether selection process 15:10:42 governed by Case Management Order 11, paragraph number 4, you all were to, by today, exchange your lists of four bellwether cases and to have discussions about the other four that you want to go into what we've designated Discovery Group 1.

MR. NORTH: Your Honor, we are and have been 15:11:04 prepared --

THE COURT: Please speak into the mic --

MR. NORTH: We are and have prepared to do that. One wrinkle has developed since we submitted the report. Just last night Mr. Stoller advised us that two of the pool 15:11:15 from which we're drawing are -- they're going to dismiss those. Those were two of the ten we intended to name today. And we're concerned about this because both of those people -- one is deceased. Or has recently died. I believe a Suggestion of Death was filed earlier this week. We 15:11:37 understand to some extent him. We don't understand the

15:11:39 second.

It's not a strong case for the plaintiff and we put it in there because we think a few cases, not all of them but a few cases that have no or little damage need to be part of 15:11:51 this process. And this is one where they now claim that she's discovered she did not have a claim, and they say she recently went to the doctor. The records show she went to the doctor in September, and this is the doctor's visit they're talking about.

15:12:06 So we find ourselves in a situation the night before we exchange these, one of our picks and one of our important picks, we think, for how we've tried to give representative choices in various categories, is no longer on the table based upon information they have had or should have had for three 15:12:25 months.

What we're concerned about, and this is the first instance of this, but in MDL after MDL after MDL throughout the country, there are growing concerns about plaintiffs manipulating the bellwether pool.

15:12:40 I don't have enough information to know if that's what's going on here, but I'm concerned about it when they had this information two or three months ago, or should have, their client did, on which they based the decision to dismiss. And now we are the night before we're supposed to choose.

15:12:56 If they had told us three months ago, we wouldn't

15:12:58 have paid the price to get all the medical records. We wouldn't have assessed them. But now we're in a position where two of our ten choices are off the table. And we think it's a very unfair situation.

15:13:10 Mr. Condo and I were talking a lot today trying to figure out how do we address what we think is the unfairness here, or what do we request? I mean, I think there would be some justification for giving us time to add two more. But that just slows down the cog completely.

15:13:27 So given the fact that they're withdrawing two people that were on our list of ten, we would suggest that a fair resolution would be for the Court to randomly just choose two names off of their ten so we submit eight names and they submit eight names. And that way it would be more of a fair and even playing field.

15:13:45 And one last thing, Your Honor, I'd mention is if this develops, as happened in other MDL's like the Zimmer MDL and the judge there has expressed a lot of frustration, if there's continuing problems with bellwether pool and possible

15:14:06 manipulation, we're going to approach the Court about a possible Lone Pine order, but that would be down the line.

MR. STOLLER: Your Honor, Mr. Flora died. I don't think his claim survives death. It's my understanding his death was not related to the filter. I'm not sure how he

15:14:26 could continue to be a plaintiff.

15:14:28 THE COURT: When did he die?

MR. STOLLER: I don't know the answer to that, Your Honor.

MS. KOWALZYK: It was October 15th. October 15th, Your Honor.

15:14:33 THE COURT: And do you have any reason to dispute he died on October 15th?

MR. STOLLER: I don't, Your Honor, sitting here today.

15:14:41 THE COURT: When did you notify plaintiffs one of the bellwethers had died?

MR. STOLLER: I believe a Suggestion of Death was filed in this case earlier this week.

MS. KOWALZYK: December 7th.

15:14:52 MR. STOLLER: Okay.

THE COURT: So why the seven-week delay between him passing away and you letting them know that one of the bellwethers had died?

MR. STOLLER: I don't know why it took seven weeks

15:15:05 to put -- to get a Suggestion of Death out, Your Honor. I don't know the answer to that. It's not our case, it's not a PLC, it's not a case that belongs to a member of the PLC.

THE COURT: It's a bellwether. I mean, it's in the pool.

15:15:19 MR. STOLLER: I understand.

15:15:20 THE COURT: It's a pretty important case to keep track of.

MR. STOLLER: I understand that, Your Honor. I don't have an answer to that question.

15:15:26 THE COURT: What were you going to say about the next one?

MR. STOLLER: The next case is Patricia Levy. I spoke with -- she's a Gallagher & Kennedy client. I spoke with her last night as we were getting information on the

15:15:41 various cases in the last week for purposes of making selections. Talked with her at that time about what she wanted to do with her case. She indicated to me she wanted to dismiss. Her case has not been dismissed. I thought in fairness I should let plaintiffs counsel -- excuse me,

15:15:57 defense counsel know before they made their selections that's what she intended to do so if it was going to affect it they could raise the issue today. But I brought it, Your Honor, literally as timely as I knew that that's what she intended to do. I brought it to their attention the same day.

15:16:13 My concern was exactly that they picked her and then we did it the next day and it sounds like sleight of hand. I didn't want it to look like that. It is not sleight of hand. She went and saw her doctor. She got a scan earlier this year. We talked to her after that. I don't know the date, I

15:16:30 don't recall the date when we spoke with her after that. We

15:16:33 spoke with her a couple sometimes asking if she intended to pursue the claim or not. The conversation yesterday, I was on the phone with her for about 30 minutes. She said she did not want to pursue her claim.

15:16:44 I did not seek a stipulation for dismissal. I wanted to notify them that that's what she intended to. She's filed, they've answered. They have a right to pick her case. They have a right to put her into the next set of the discovery pool if that's what they choose to do. Her case is still on

15:16:59 file. She doesn't have a right to dismiss as of right. They've answered. I thought it was information they needed to know as timely as we knew it.

THE COURT: So what is your intention with respect to Ms. Levy?

15:17:12 MR. STOLLER: Well, if it's their true contention that she's one of their final 10, then my guess is she goes into the discovery group. I think it's a bit of a waste of time to take a plaintiff who -- and, Your Honor, let me be clear about this. I stood here in this courtroom when we

15:17:30 talked about *Lexecon* waivers. We've known -- she's our client. We've known her for, boy, a year maybe. We asked her to waive *Lexecon*. We asked her to bring -- if we were trying to keep her out of the pool, which we've not done with anyone, Your Honor, we've not tried to keep anybody out of

15:17:47 the pool.

15:17:49 We've tried at every step to make sure every case is eligible to go on. We wouldn't have -- we wouldn't have let it get to this step. We did, with many of our clients, go back, get a scan, talk to your doctor, decide your next steps. 15:18:03 That's what she did.

If she goes on to the next phase in the discovery pool, the bellwether order has a provision in there that says, look, if somebody drops -- if a plaintiff drops out of the bellwether -- out of Discovery Group 1, sorry, they get to 15:18:17 pick another case to replace it. That would be their remedy. But I thought it made much more sense to raise the issue now than to wait to see if they picked it and then have her say I'd like to dismiss them. I think in fairness letting them know sooner rather than later was the right thing to do.

15:18:35 THE COURT: What is your response to Mr. North's proposal?

MR. STOLLER: I think that's not fair, Your Honor. I don't know what their top four are, but their top four is whatever their top four our. Each side has a right to pick 15:18:47 four cases to move on.

You indicated a moment ago the exchange today was top four and discuss eight. The actual deadline today is a list of ten with our presumptive four to go -- I shouldn't say presumptive. Our actual picks to go into the discovery pool.

15:19:03 We're then to meet and confer over the next week

about the next four to go in, see if we can come to agreement on those, and if not, file next Friday competing -- I'm not sure they're motions, but at any rate competing position papers on who this Court should select as the remaining four.

I don't think anything changes in that analysis given what's happened. I mean, we don't control, particularly as to Mr. Flora, we don't control that he died. That's not -- and, again, what would happen if we were -- next week or two weeks from now is they would have a right to pick two cases. If they're their picks, which they've said they are, they have a right to pick two cases and to replace them.

THE COURT: Well, let's pause for a minute on the procedure that you've just described.

Section IV A.1 of Case Management Order 11 says that by today you exchange lists of ten cases selected from the PFS/DFS Group 1, and the parties each designate four cases on those lists for automatic inclusion in Discovery Group 1.

My understanding is that you each provided the list of ten, but you also identify the four you're picking for automatic inclusion.

MR. STOLLER: That's correct, Your Honor.

THE COURT: Okay. I thought you were suggesting that doesn't happen today.

MR. STOLLER: No. My understanding what you said earlier, Your Honor, was we were supposed to have engaged in

15:20:34 the conversation about the next four by today, where we would be down to the four/four and then the final four.

And, Your Honor, both sides are prepared -- we have not yet exchanged those lists, but we had agreed we would do so at this hearing.

15:20:49 THE COURT: So Mr. North, are you saying these two cases that have now disappeared were going to be on your list of ten or list of four or both?

MR. NORTH: They would have been in the list of 10, Your Honor. Not the list of four.

15:21:01 THE COURT: So you picked four for automatic inclusion that do not include those two?

MR. NORTH: Right. But those two were part of the six we then were going to enter into this discussion process with Mr. Stoller.

15:21:15 And I'm not attempting or suggesting the Court deprive them of two of their four because our four are intact too. But it seems to me one remedy would be for the Court to randomly pick two of their remaining six to take off the table and then we would work out the other four from the eight that are left, as opposed to the 12 that are left.

15:21:29 THE COURT: What's wrong with that, Mr. Stoller?

MR. STOLLER: Well, our -- I don't know how they composed their list, Your Honor, but our list is composed of cases to give the Court options. We're not sure how you're

15:21:45

15:21:49 going to want to stack the six you're going to set for trial. We have included in our ten different devices on the idea that Your Honor's going to want perhaps a Meridian case or Eclipse case. If you were to randomly clip people off on
15:22:05 ours, you might clip off our Eclipse case or our Meridian case, for example. And then we wouldn't have -- you would have only one choice for what the -- it's the later devices that are going to be smaller represented ones in this MDL at this point, particularly the Meridians, to some degree the
15:22:22 Eclipse. I don't have my numbers with me, but last time I looked at it, which was, candidly, a couple months ago, I think two-thirds of the MDL, if not more, is Recovery, G2, G2X, G2 Express. The latter three are essentially the same device. So your latter two -- latter three devices are the
15:22:40 relatively small represented. And I'm sure if you want to go with purely representative given there's multiple devices and multiple injuries, but we wanted you to have that option so if your thought process is when you pick cases you want to have that sort of a makeup of it, to have representative
15:22:58 devices.

If we randomly strike those from our six, you could take out one of those cases and leave yourself with only one potential option for -- I'll just use an example, for an Eclipse case. Because we --

15:23:11 THE COURT: But I don't have that option unless you

15:23:13 all put it on the list of 12; right? I mean we're going to winnow this group of 20 down to 12, hopefully by agreement. If not, I'll pick four of the 12. There's no guarantee those 12 are going to cover all devices. You can pick all the 12 without my involvement.

15:23:30

MR. STOLLER: We could. But we could also get to the point where we don't agree and we have four and four and you look at those and say I've got a Recovery, I've got some G2s, I want Eclipse as one of those four, I want a Meridian as one of those four, and are choosing between different cases.

15:23:42

THE COURT: But what you're suggestion, I think, is that I choose those four, if you can't agree, from a remaining group of ten, six of which you've picked and four of which the defendants have picked.

15:23:54

MR. STOLLER: Well, I would submit that they add two other cases into it so that we're at -- you have a full 12.

THE COURT: Haven't you been doing some looking into these cases? I don't want to delay the process. Doesn't it become difficult for them to pick out two more cases that they haven't looked into?

15:24:10

MR. STOLLER: I would tell you, if you said to me, Paul, we're going to take two of your cases out, I would within an hour tell you the replacement two.

I mean, we went through all 48 cases, and I will tell

15:24:21

you we ranked them with precision. But we spent a lot of time on this, figuring out what we thought are the best cases for this Court to try, and we didn't just go here's ten and then not look at the others. We looked at every case. We did extensive analysis of every case.

Again, if you said to me, Paul, I'm going to randomly take out two cases and you have to replace them, I know what my next two are. At least, you know, I would have to in some cases look at, okay, if you took out Eclipse now I've got to go down and look for another Eclipse and where does that fall in our tiering. But it is not the case, and I don't think it would be the case for them either, that they said we only looked at 10 cases. I suspect they know another two, three, four cases that would be next on their list.

THE COURT: Mr. North.

MR. NORTH: Your Honor, he's correct. Of course we would go back to the well and find two more cases. We've looked at all 48 ourselves. Our point is we don't believe it's fair because we now have two less to choose from through no fault of our own, and therefore we've got to get what was our 11th and 12th choice as opposed to our first ten. Through no fault of our own.

I would also say we are in the same boat when it comes to representative cases among the different filter types. I understand the risk he's talking about. We're

15:25:40 facing that risk. The one Denali case we had in our ten is now gone.

One thing I would point out, Your Honor, is we did an analysis as of the inventory through Wednesday in this MDL. 15:25:55 Filter type, other than Simon Nitinol, with the least number of cases in this MDL is now the Recovery filter at 10 percent. There are more Denali cases, more Meridian cases, double the number of Eclipse cases than there are of Recovery. And G2 is, of course, far and away the largest with 41 percent of the 15:26:16 entire inventory.

THE COURT: Okay. Give me just a minute.

Mr. North, are you saying that before you learned of these two, you had put them on your list of ten?

MR. NORTH: Yes, Your Honor.

15:34:25 THE COURT: All right. Well, here are my thoughts on this. It does not appear to me that the elimination of these two names from Discovery Group 1, is that what we're calling it? From -- no. I lose track of all these names.

MR. STOLLER: Yes, Your Honor, Discovery Group 1.

15:34:47 THE COURT: PFS/DFS Discovery Group 1.

MR. STOLLER: Okay. I'm wrong.

THE COURT: It doesn't appear to me it was a deliberate effort or calculated effort to manipulate the pool, but it has decreased the number of choices the 15:35:04 defendants otherwise would have made in their group of ten.

15:35:07 I think in fairness -- well, and at the same time, I would like -- if you put the question to me to pick four bellwethers, I would like to have 12 cases to pick from rather than eight. So simply knocking two off the plaintiffs' list 15:35:24 of ten and having each side submit lists of eight to me isn't as optimal.

So what I propose to do is this: Have you identify your ten for me, Mr. Stoller. Well, have you identify for me the six of your ten who are not in your list of four choices.

15:35:38 MR. STOLLER: Okay.

THE COURT: And I'll knock out two of them at random. And then you each will compile your list of ten again.

So you still get to put in ten names, you get to put 15:35:49 in ten names but, in effect, you're each making your choices from 22 cases rather than 24 as we had at the beginning.

That doesn't interfere with your first four choices. It doesn't limit the number I have to choose from if you are unable to make a pick. It does allow the parties to take into 15:36:08 account what filters are at issue in which cases when you come up with your final list of ten. The loss of two is as fortuitous to you as it was to defendants, and it seems to me to balance the tables and everybody just ends up picking from a list of 22 rather than a list of 24.

15:36:28 MR. STOLLER: Understood. How would you like to us

15:36:29 get you those names?

MR. NORTH: Do you have it here? Maybe you can just give it to him.

MR. STOLLER: I do, but not written out in a way 15:36:40 that makes it really easy. Our names are alphabetical, so I don't have them segregated by here's top four, here's bottom four -- bottom six or whatever.

THE COURT: But you've got your four identified; right?

15:36:50 MR. STOLLER: I do. And I'm happy --

THE COURT: I'm not going to interfere with your four. You've got those four. It's the remaining six I'm going to knock two out of. And you can replace them with others that you didn't put on your original list of ten.

15:37:03 MR. STOLLER: One of the things I was going to suggest, Your Honor, and maybe a way to help expedite this a bit, my understanding is that Mr. North said their only Meridian case got knocked out.

Is that right?

15:37:16 MR. NORTH: No, it was Denali.

MR. STOLLER: Denali. I apologize. I'm wrong.

THE COURT: Okay, so if you have a list of ten, I just want to know the four I'm not supposed to knock out. So identify those.

15:37:28 MR. STOLLER: Circle those?

15:37:29 THE COURT: That's fair.

You haven't shown it to Mr. North yet; right?

MR. NORTH: If I could propose this, I think this would work. It's going to do what you're saying, and then 15:37:50 with those two knocked out, you can tell us what those two names are, and then both sides can go back and do a new list of ten and exchange it Monday morning.

THE COURT: That's my thought. Or even later today if it's easy. But, yeah, that's my thought.

15:38:01 Why don't you bring that up, Mr. Stoller.

MR. STOLLER: I've circled the ones that are the protected four.

THE COURT: Right. Okay. So I'm not going to knock off the protected four. I'm going to knock off Mary Duffie 15:38:20 and Nicole Gross. It's a 2015 and 2016 case. Those are off your list of ten. You can replace them with others that are in the -- whatever that long name we gave them -- PFS/DFS Group 1. So when you exchange it, your list will have ten, the defendants' list will have ten, and we're not encumbering 15:38:46 our ability to have maximum options when we pick the four bellwethers if you all can't agree on them.

So what we need to have done, then -- I need to make sure you're hearing this, Mr. Stoller, to agree.

By next Friday you're either going to give me an 15:39:09 agreed upon list of 12 or you're going to give me an

15:39:14 even-numbered agreed upon list with either my having to pick two or four that you can't agree on, plus memoranda from each side as to whom I should pick to fill those slots. That's what I think the order calls for.

15:39:27 And then by a week from Friday, which will be the 22nd, you're going to get response memorandums explaining why the other side's memorandum is wrong as to whom I should pick. And I'll read those and I'll pick the rest of the bellwether pool.

15:39:43 So if you all want to do that later today or wait till Monday to do it, that's fine with me. If you need time to figure out who the two additions will be, that's fine.

MR. STOLLER: Monday? We can do it today --

MR. NORTH: Let's see what time we get done.

15:39:58 MR. STOLLER: Okay.

THE COURT: When we were here last, I had indicated in Case Management Order 18 that by today you would have a proposal for me on how the bellwether discovery was going to proceed. I didn't see that in your joint report.

15:40:13 What I'm referring to is a sentence on page 4 of my Case Management Order 18 which said, "The parties should be prepared at the next case management conference to propose the nature and timing of discovery to occur during this period," meaning between now and the actual bellwether

15:40:29 selection.

15:40:30 MR. NORTH: Your Honor, candidly, I just realized last night we had omitted that. I do apologize.

The parties have planned two meet and confer sessions over the next week to see if we can reach agreement as to the 15:40:45 final bellwether pool people. So I think we could also come up with some plan to submit to the Court next Friday as a part of that process, if that works for the Court.

MR. STOLLER: I was just going to reiterate what Richard said, Your Honor.

15:41:01 THE COURT: Okay. So by the 16th, then, you will get me not only your bellwether selections and any memos on people I need to select, if any, but you'll also get me a proposed case management schedule for the discovery of the bellwether cases. And I'll reflect that in the order that 15:41:21 comes out.

Okay. Anything else we need to address on bellwether selection?

MR. NORTH: Nothing, Your Honor.

MR. LOPEZ: Your Honor, on the selection, if we 15:41:35 don't agree what you're going to pick -- we should probably have an agreement this is a two-page summary, one-page summary of each case. I don't know that we've done that. I mean, you don't want a trial brief with tabbed medical records.

15:41:47 THE COURT: You are exactly right. I guess I

didn't -- let me see if we specified that in the order.

It just says with a memorandum in support of their selection.

Let's say three-page memorandum per plaintiff advocating why you think I should pick the person you're advocating for.

MR. LOPEZ: Thank you, Your Honor.

THE COURT: And with responses that come in a week later, three pages per plaintiff as well.

Okay. Lets talk about the mature cases for a minute. I have a question for plaintiffs counsel on this.

Well, let me ask you first, defense counsel. My understanding from what you've submitted is that you plan to produce expert reports that address the FDA warning letter and the Kay Fuller allegations as part of the expert disclosures in the MDL.

MR. NORTH: Absolutely, Your Honor. We've been working extensively with our experts on that.

THE COURT: Okay. I just need to know the answer is yes.

It seems to me that in terms of remanding the mature cases, and I want to do that at the first opportunity that it's available, if there is the possibility, as it seems to me there is, that those mature cases will include the FDA warning letter and the Kay Fuller allegations and the parties' experts

15:43:43 on them, then we ought to get through those expert disclosures and discovery and *Daubert* motions, if any, before we remand them.

If they're not going to involve the FDA warning 15:43:55 letter or Kay Fuller allegations, then perhaps we can send them back for trial now. But I'm assuming those aren't parts of the case the plaintiffs want to drop out and therefore, I hate to hang on to them longer than necessary but it seems to me it is necessary to get that expert disclosure done.

15:44:14 MR. LOPEZ: I don't disagree, Your Honor. Some of these have experts that have already been disclosed. I think part of the issue was the ability for them to supplement their reports with anything that developed from the Kay Fuller and the warning letter discovery.

15:44:33 So I would say that -- I mean, there's couple ways to do that. I mean, we could -- we could still remand these cases sooner than when those -- when we currently have those experts prepared pursuant to the schedule you have here, and maybe in some of these cases where there's already been 15:44:55 experts that have developed, we're talking about just supplementing their report and our reports and maybe a follow up deposition.

So at least maybe give us an opportunity to on maybe some of these cases if there are some -- some of these were in 15:45:10 motion in limine. I mean, we were literally ready to have the

15:45:14 judge -- in the Tillman case, for example, in Jacksonville, motions in limine were pending. Experts had been exchanged and deposed. There may be instances like that.

I mean, I think the point here is the sooner we start 15:45:28 getting cases ready for trial here, whether it's the bellwether process, we have a state court case, which I was going to report to the Court today that's scheduled, we just found out, a week -- I guess it was last week that we have a March 20 trial date, which is in a lot of ways a bellwether 15:45:44 case. This PLC has been very actively involved even though it's a state court case with counsel from Florida.

So maybe -- I think generally for most of these cases that's correct, because I think most of them did not get to the stage where we had expert reports exchanged, but allows us 15:46:04 opportunity to submit to the Court something that might be a hybrid of that in one or two of these cases.

THE COURT: Well, what I would suggest, Mr. Lopez, is that you confer with defense counsel about whether there is a case where the experts were sufficiently advanced that 15:46:22 there's a discrete way to supplement and move to trial, and I'm more than happy to consider that. It just occurs to me that in this MDL there's been a lot of discovery that I think primarily the plaintiffs have wanted related to the FDA letter, Kay Fuller allegations on both sides. That discovery 15:46:43 is undoubtedly going to be something one side or the other

wants to use in these cases when they get back. That discovery may have an effect upon any *Daubert* motions that are made on the experts. I don't see it makes much sense to send them back to those courts incomplete and say, you know, either you follow along with what we're doing in the MDL or you decide, Judge, if you want to go the same way we do in the MDL, that sort of defeats the whole notion of the MDL.

But absolutely, if there's a clean way to carve off a case and get it back and get it tried, I'm happy to do that. I just think we've got these issues that are MDL issues that are likely to arise. But I'm happy to consider proposals as we move forward.

MR. LOPEZ: I don't disagree, Your Honor. Thank you.

THE COURT: Okay. So for now we're going to hold on to the mature cases.

With respect to depositions of plaintiffs counsel, I think I do need briefing on this issue. It's an important decision whenever a lawyer's going to be deposed.

It appeared to me, defense counsel, that you had essentially briefed it in your portion of the joint report. You laid out authorities, you attached exhibits. What I would be inclined to do is let the plaintiffs file a response and you a reply on those same issues, rather than start the briefing over.

15:48:07 MR. NORTH: That's fine, Your Honor.

THE COURT: Okay. How much time do plaintiffs counsel need to put together a brief on the deposition of those lawyers?

15:48:17 MR. BOATMAN: A week, Your Honor.

THE COURT: That's fine. So let's say that the plaintiffs brief will be due on the 16th.

And can we get the defendants reply a week later on the 22nd?

15:48:30 MR. NORTH: Yes, Your Honor.

THE COURT: Okay. When I get those in, if I think I need to hear from you, I'll let you know, get you on the phone for argument. Otherwise I'll rule, probably in early January.

15:48:47 Okay. With respect to the 30(b)(6) deposition, I have read what's in the report. I have not had time to go through the matrix that you've submitted. And I guess my first question is whether you've made any other progress on this matter? And, if not, whether you want me to rule on the

15:49:10 basis of the matrix.

MS. FLEISHMAN: We've -- Wendy Fleishman on behalf of the plaintiffs, Your Honor. Yes, we've made a lot of progress. I think we've resolved all but one issue now. And the one issue has to do with deposition number 15 which

15:49:26 appears at page 22 of the report, Your Honor.

15:49:34 We've asked Bard to identify a witness who could identify the safety status of Bard's IVC filters for and indwell times in excess of two months. What we're actually asking --

15:49:45 THE COURT REPORTER: Excuse me, Counsel --

THE COURT: Hold on just a minute.

The word was indwell, I-N-D-W-E-L-L. Which I assume means the amount of time it's in the body.

MS. FLEISHMAN: Exactly, Your Honor. It's Bard's 15:49:58 term of art. It goes to their analysis. Whether or not they've made any kind of analysis of that issue. Not an end point in any of their studies because we've looked through all their studies and we know it was not an end point, but we think it was -- it was a point of analysis. We wanted to 15:50:17 depose someone who will address that.

THE COURT: Address whether it has occurred or, if it occurred, what the result was?

MS. FLEISHMAN: Whether anybody analyzed that the longer it stays in the body, the greater the risk of danger. 15:50:32 Which is exactly what is in the FDA notice of 2014.

THE COURT: But my question is, do you want a witness who can say, yes, we looked at it, or do you want a witness who can say we looked at it and this is what we found?

15:50:49 MS. FLEISHMAN: We looked at it and this is what we

15:50:51 thought. Or we didn't look at it at all.

THE COURT: Okay.

MS. KOWALZYK: Your Honor, Brandee Kowalzyk on behalf of the defendants.

15:51:03 As you saw by reading the joint report, obviously there were a number of topics that we were pretty far apart on in terms of what we deemed was feasible. And this was the one that sort of befuddled me the most because -- and we've had extensive meet and confers, four, five lengthy phone

15:51:27 conversations and e-mails back and forth.

And just by way of background, Your Honor, I've been involved in this litigation since pretty much the beginning, for 11 years. So I'm pretty familiar with the types of studies that have been done and analyses that have been done

15:51:44 and that sort of thing. This is one where I just couldn't determine any kind of parameters on what the plaintiffs meant, but for everything.

On our last phone conversation I asked them, do you mean analysis with the primary purpose of determining whether

15:52:04 there's a correlation between indwell time and complication, and I was told in no uncertain terms no, it is not limited to that. It would include that, but it would include anything -- I think it was -- Ms. Fleishman used the term any tertiary finding, any secondary finding, any incidental

15:52:21 finding.

15:52:22 And based on what I know about Bard's R and D efforts and trending efforts and everything that they do with respect to Recovery filters in both developing and then trending after they're on the market, this is the quintessential back the 15:52:39 truck up discovery request. This -- that would implicate fatigue testing, it would implicate animal testing, other certain types of bench testing. It would implicate the Everest study and the Asch study and the Denali study. And when I pointed that out to the plaintiffs' counsel, they told 15:53:00 me that's what we want.

And so given that and their, you know, sort of refusal to sort of limit this to terms that not only comply with the scope of Rule 26 but are within the bounds of sort of what's doable, that's why this is still one that's remaining, 15:53:25 I guess.

It strikes me that -- I don't know the total number of depositions that have been taken, I know we were in the 80s before, 82 or something, at the beginning of the MDL, and we're probably in the 120s or 130s at this point, and all of 15:53:41 the millions of pages of documents that have been produced, in a way this request implicates everything that's already ever been done. And so we just don't think that it's even feasible for us to comply. We don't think that the topic as a articulated complies with rule 30(b)(6), which requires the 15:54:05 topic be stated with reasonable particularity.

15:54:09 THE COURT: Okay. Give me just a minute before I hear from plaintiffs' counsel just to read what you've written here.

All right. Ms. Fleishman.

15:56:06 MS. FLEISHMAN: Yes, Your Honor.

In May 2014 the FDA issued a safety alert that said, among other things, that if the patient's transient risk of pulmonary embolism has passed, the risk/benefit profile begins to favor removal of the IVC filter between 29 and 54 days 15:56:31 after implantation.

The FDA came to this position based on conversations with Bard and review of the literature. This is central to the case, what the indwell time is, what is that safe indwell time, and at what point is the patient supposed to have the 15:56:51 filter taken out. And it is central the medical monitoring case because in order to determine that you have to monitor the patient.

So we're asking what information or analysis Bard has made in connection with that exact question. I don't think 15:57:05 that we're asking for the moon, as counsel has suggested to the Court.

THE COURT: What is that exact question?

MS. FLEISHMAN: The question is what analysis did Bard do in connection with whether the safety of the filter 15:57:21 increases or decreased over time during the time it's

implanted.

So at some point the safety of the filter decreases over time, is our analysis, what we believe, based upon that time that it's dwelling in the body. And indwell is the language that they use.

THE COURT: Well, so, are you saying that the only thing that you want in this deposition is any analysis Bard did of the correlation between safety and indwell time?

MS. FLEISHMAN: Yes.

THE COURT: So if they've got 50 reports that touch on the safety of the product, not correlated to indwell time but would include periods that were after two months, that is not what you're after. You want to know whether there was any analysis of a correlation between indwell time and safety?

MS. FLEISHMAN: Yes, Your Honor.

MS. KOWALZYK: I guess I would ask for clarification because when I asked if they meant analysis or studies with the primary purpose of determining if there was a correlation, I was told absolutely no, it was not limited to that. Is that the limitation?

THE COURT: Ms. Fleishman, I understood you to just say it is limited to that; you want studies of the correlation, if any.

MS. FLEISHMAN: Analysis of the correlation. They

didn't study -- Your Honor, they didn't study indwell time as being the end point of the study. And counsel -- and this is where I think our confusion was. Counsel had asked me whether we want any studies in which the indwell -- safety of indwell time was in fact the end point of the study. And we know that that wasn't studied in that way. But what happened was they looked at the study -- they looked at the studies and realized, whether or not they realize over time, that there is this sort of scale of remaining in place and increasing danger. So we wanted -- a risk. We want to know whether that analysis was done.

THE COURT: Does that help?

MS. FLEISHMAN: No -- I'm sorry.

MS. KOWALZYK: It doesn't, Your Honor. I'm sorry. I'm trying to frame this in terms that would make this doable for us. Like do they mean did a team -- Bard was all about putting together teams. You've heard lots about lots of them. Was there a team conveyed? Was there a project undertaken? Was there something -- something that would allow us -- allow me to understand what they're looking for, because it just doesn't.

THE COURT: Well, let me ask it this way, Ms. Fleishman. Let's assume hypothetically that in 2011 a Bard engineer sitting at his desk thought maybe there's a correlation, thought about it, maybe talked to somebody in

16:00:17 the next cubicle and maybe jotted down a few handwritten notes. You're after that, according to the way you've defined it; right? I mean, that's analysis of the correlation.

16:00:30 MS. FLEISHMAN: The engineer sitting at his cubicle jotted down a few notes, sent it down the hall to John via e-mail and they discussed it among their group to see whether or not they should analyze it further or is this a secondary finding that we're seeing, and they discussed it, certainly

16:00:49 that would be -- that would be the kind of thing we want to know about.

And do the -- and let's say those two -- those two and then three engineers spoke about it and they said, well, should we take it to whomever in the company to do further

16:01:03 analysis? They take it to whomever in the company and the person in the company says no, we don't want to look at that.

THE COURT: So here's -- here's, I think, the issue I'm hearing from the defense: how do they find that, that memo or that e-mail, without going through every study

16:01:19 they've done, all of their e-mails? How do they find whether any person within Bard ever analyzed that in response to your question?

MS. FLEISHMAN: Well, because the people that would have looked at the studies is a finite group. It's not this

16:01:32 big, diverse group.

16:01:34 THE COURT: But you said "the studies." You mean over the last decade?

MS. FLEISHMAN: Well, actually there's only three studies they themselves have undertaken and they have looked 16:01:44 at about, at most, 17 other studies in the medical literature. So there's not -- we're not looking -- we're not looking at a world of studies that's so extensive. So it's very -- it's a small universe.

THE COURT: Well, so are you going to limit the 16:01:59 analysis to those studies?

MS. FLEISHMAN: It has to be limited to those studies, Your Honor, because that's all we have.

THE COURT: Okay, but you said earlier you wanted analysis not studies.

16:02:09 MS. FLEISHMAN: I'm not looking for studies at the end point because it doesn't exist.

THE COURT: Well, but are you saying the analysis you want is limited to those three studies?

MS. FLEISHMAN: No, it would be limited to that set 16:02:21 of literature of studies of IVC filters. So there's -- there's studies they did, Bard sponsored, and then there's studies that were done by competitors or scientists on these IVC filters.

THE COURT: Let's assume hypothetically my engineer 16:02:38 at his desk isn't looking at any studies when he does this

analysis, or what we can call analysis. Do you want that?

MS. FLEISHMAN: Yes, I guess I do.

MR. LOPEZ: Can I say something?

THE COURT: Yeah. I mean, I do see Bard's problem that if you want every instance where the question of is there a correlation crossed the mind of somebody at Bard, how do you find that? That, to me, is a legitimate question. What I'm trying to do is figure out do you really want them to go through everything that could possibly contain that, or is there a more focused inquiry that you were asking for.

MR. LOPEZ: I think the focused inquiry -- it doesn't have to be analysis. If they just have data that exists that shows, for example, someone just looked at data and they say five years, 40 percent fracture rate of our G2 filter. We don't know what they have. And I understand what you're saying --

THE COURT: Again, Mr. Lopez, how does that exclude the guy sitting at his desk who thought about that?

MR. LOPEZ: It shouldn't. It should not.

THE COURT: So how do they find that?

MR. LOPEZ: Well, I mean, we're doing predictive coding right now on four and a half million pages of documents. That's one way to do it, predictive coding on indwell time and risk over time.

THE COURT: You can do that; right?

16:03:58 MR. LOPEZ: Pardon me?

THE COURT: You can do that on their four and a half million pages.

MR. LOPEZ: We could. We are. But the point is

16:04:04 that's on -- that's on -- on this finite amount of information you're talking -- or the type of information which may be just one guy sitting at his desk having that discussion, we could do that. I think what we're looking for in the 30(b)(6) deposition is someone to speak on behalf of

16:04:20 the company as to what the company's official position was based on their analysis of what the FDA came out with in 2014 and SIR in 2016 and Health Canada in 2016 that the longer these devices stay in people, the more dangerous they are and the risk/benefit flip-flops; there's too much risk and not

16:04:41 enough benefit. That's a huge issue in this case, not just for medical monitoring but for every device we're litigating here. So it may take an extra effort here, Judge. I understand. I should say "Your Honor."

THE COURT: You can call me Judge.

16:04:56 MR. LOPEZ: Usually when you're on the bench I'll say Your Honor. Used to doing that. Old school.

THE COURT: In Africa they say Your Worship. If you want to use that, that would be okay.

MR. LOPEZ: I have a son that works for me. He

16:05:11 calls me Dad. That's pretty good, too.

16:05:14 I understand this may take a little bit of extra effort than maybe finding a study that they did or finding a spreadsheet of analyses they did over time. We have all that. But this issue is so central, not just to the medical 16:05:32 monitoring case but to what two government agencies are saying, what the SIR, which is the Society of Interventional Radiologists, the doctors that put these in, have said in 2016 the risk/benefit of these devices do not exist after a certain period of time.

16:05:50 So we want to know what the company has on that. In other words, does the company have that kind of data or did the company just sit back and wait for Health Canada, the FDA, and SIR to come to that conclusion?

So I think there's a way to do it. Whether it be 16:06:05 them doing predictive coding and finding who might be the best person there to come and talk to us about that. It's probably someone in clinical -- I forget what they call it. Clinical trials or clinical department. There's got to be one person in the company right now who can gather all of 16:06:23 that information, get educated like the 30(b)(6) rule requires, and talk to us on behalf of the company as to what they did as they were learning about something FDA learned about, Health Canada learned about, and the Society of Interventional Radiologists learned about over time.

16:06:43 I think that's the point, we just need somebody to

16:06:46 speak to us on behalf of the company and for them to give us everything they have that shows what they did or don't do on what is the most important issue, at least with two government agencies and the society who puts these in.

16:07:33 THE COURT: Any other comments?

MS. KOWALZYK: I guess a general comment. To the extent that -- it seemed to me as if maybe Mr. Lopez was suggesting we need to give them information that they don't already have, and I would certainly think that they have any

16:07:55 information that would be responsive to this. The only way to find that, we would have to do, I guess, what they're doing, search all of the ESI. Like Mr. North has been saying, this would require us to interview hundreds of employees. So a lot of witnesses have been asked questions

16:08:19 about the 2010 and 2014 FDA notices.

I just -- unless you have any specific questions, I think you understand our position.

THE COURT: Okay. Thank you. Hold on just a minute.

16:11:51 Well, here's the problem I see. I think the topic is clearly relevant to both the MDL and the class action. 30(b)(6) depositions are useful for accumulating information generally known to an entity but become, in my view, unworkable and overburdensome if they're used to collect the

16:12:18 kind of granular information that you would normally get

16:12:21 through document production or through depositions of individual witnesses.

So oftentimes in cases where somebody proposes what would be a very demanding 30(b)(6) topic for a company or an
16:12:37 entity to collect, it happens early enough in the case where my response is that's really not an appropriate 30(b)(6). Ask that in your depositions, include that in your document production, search for it as you go.

Here we've got the problem of completing over 100
16:12:54 depositions and closing in on the close of discovery and now having the 30(b)(6) topic identified. So that avenue isn't available, to say do it as you go. Presumably this has been an issue known to plaintiffs so you've been doing it as you've gone along to some extent.

16:13:11 And so it seems to me that to avoid what I think would be an overly burdensome task of literally trying to identify every instance within the company where any employee ever thought about or talked with somebody about whether there was a correlation, which I don't think is feasible, or
16:13:32 requiring defendants to do predictive coding of the 4 million and a half documents that the plaintiffs now have in their possession, it seems to me we necessarily need to approach this at a somewhat higher level where the plaintiffs can get some general information about it, but Bard doesn't have the
16:13:51 burden of interviewing every employee who may have ever had

16:13:54 this cross his or her mind.

So it seems to me something like this could at least get toward that. The topic could be did the defendants ever conduct any studies, formulate any company position, or adopt 16:14:09 any policies addressing whether there was a correlation between indwell times and safety risks.

That, to me, is something that the company could get their arms around, and it would provide plaintiffs with helpful information.

16:14:27 I mean, if the answer is no, that helps you in your argument. If the answer is yes, you can focus in and look at what was done there. And it eliminates the burden of doing the document-by-document or person-by-person search.

I'm interested in your reactions.

16:14:46 MS. FLEISHMAN: I think that's great, Your Honor.

MS. KOWALZYK: I think that would be acceptable to us, too. And I didn't get it --

THE COURT: Okay. This is the way I wrote it. I'll put it in the order. And you're free to tweak the language 16:15:00 if you want. But what I put is "Did defendants conduct any studies, formulate any company positions, or adopt any policies addressing whether there was a correlation between indwell times and safety risks?"

MS. KOWALZYK: That's fine, Your Honor.

16:15:18 MR. LOPEZ: So we're talking about this will be a

16:15:21 formal interrogatory --

THE COURT: No, this will be 30(b)(6) topic.

MR. LOPEZ: Oh, oh, oh. Okay.

16:15:29 THE COURT: This will replace Topic Number 15. And the rest have been agreed upon, so you can do your 30(b)(6) deposition.

MR. LOPEZ: Plaintiffs are in agreement, Your Honor.

THE COURT: Okay. All right. I'll include that in the order.

16:15:43 The other matters I wanted to take up with you briefly before I hear whatever you have, I just want to -- I don't know if you'll be conscious of these.

We have a stipulated notice to strike a second amended short-form complaint that was filed at the end of

16:15:58 November on behalf of Nash Zehnder, Z-E-H-N-D-E-R, indicating a short-form complaint was filed without Bard's consent or leave of court. I'm assuming you don't object to our letting them strike that short-form complaint and then either approach you or me to amend?

16:16:17 MR. NORTH: No, Your Honor. We're just getting more and more instances where people are filing amended complaints without checking with us first or moving the Court. We're just bringing that to their attention, we're not trying to stand in the way.

16:16:30 THE COURT: All right. There's a motion for leave

16:16:33 to file an amended short-form complaint. This concerns Florence Edwards, who is deceased. The case apparently was initially brought by her husband. They want to amend to substitute her sister-in-law as the plaintiff in the 16:17:03 short-form complaint. Is there any objection to that?

MR. NORTH: That's not the one where another deceased person filed a complaint, is it? There's one like that somewhere.

THE COURT: No. This is one where apparently -- I'm 16:17:20 sorry. It wasn't -- it wasn't the deceased's husband, it was the deceased's son who was plaintiff and he wants to substitute the deceased's daughter as a plaintiff.

MR. NORTH: No objection to that, Your Honor.

THE COURT: Okay. That's at Docket 4136. We'll 16:17:36 grant that.

The striking of the complaint is at Docket 4137. We'll grant that.

There's a motion to dismiss that was filed by defendants back on November 14th and this concerns an 16:17:54 individual named Aron Aldridge who was deceased at the time the complaint was filed. The motion indicates there have been several letters written, e-mails sent, both to the counsel for this plaintiff but also to plaintiff steering committee counsel, without response, so they filed a motion to dismiss 16:18:17 and it's now over time with no response. It's been on file

for almost a month.

Apparently David Matthews is shown as the plaintiff's attorney.

I'm inclined to just grant the motion because it's long overdue and there doesn't appear to be any dispute the fellow was deceased when it was filed, but I am concerned about what appears to be lack of response, both from Mr. Matthews and from PSC members who letters and e-mails were addressed to, and the motion says we couldn't get a response as to what was going to happen.

MR. LOPEZ: I'm equally concerned. I know Mr. Matthews well, so I'll certainly look into that, Your Honor. Figure out how that happened, why it happened, and rectify it.

THE COURT: All right. I'm going to grant the motion to dismiss. This motion is at Docket 4007. I'm granting it for the same reason that I granted the motion to dismiss the Noterman, N-O-T-E-R-M-A-N, a complaint back in May at Docket 1978.

And for purposes of talking it over, Mr. Lopez, this is Doc 4007 that includes the motion and attachments.

All right. Those are all of the issues I wanted to raise. Do plaintiffs counsel have other matters you'd like to raise?

MR. LOPEZ: Not at this time, Your Honor.

16:19:39 THE COURT: How about defense counsel?

MR. NORTH: Nothing, Your Honor.

THE COURT: Okay. What we need to do is set the next case management conference, then.

16:20:56 Does Friday, February 17th at 10:00 in the morning work for you all?

MR. NORTH: Yes, Your Honor.

MR. LOPEZ: Yes, Your Honor.

THE COURT: Traci, that look okay?

16:21:07 THE COURTROOM DEPUTY: Yes, sir.

THE COURT: Okay. We'll plan to have you back here on February 17th at 10 a.m.

Anything else we need to address?

MR. LOPEZ: The 17th is fine. We thought it

16:21:30 conflicted with an annual convention that we have, but it's actually the Friday after that, so we're good.

THE COURT: Okay. You all have a nice holiday. Thank you.

(End of transcript.)

16:21:40 * * * * *

C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 16th day of December, 2016.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter